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Reply Brf. of Walsh for P. E.

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OCTOBER TERM, 1899.

No. 177.

PATRICK MORAN, PLAINTIFF IN ERROR,

vs.

JOSEPH HORSKY, JR., DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

THOMAS J. WALSH,
Counsel for Plaintiff in Error.

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IN THE

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The following considerations and authorities are submitted in reply to the brief of defendant in error:

I.

As to jurisdiction.—The argument seems to be that there are two questions involved in the determination of the court below, the one Federal and the other not Federal, and that the decision either rests on the latter or on both. The question not Federal is said to be laches.

The supreme court declared that it adopted the view of the lower court on the status of the plaintiff in error, which, it says, is that he had "disconnected himself from the

United States Government" by permitting the defendant in error for twenty years to occupy the premises. Those circumstances, they say, make it a proper case to apply the doctrine of laches.

It will be observed that the supreme court simply adopts the views of the judge of the lower court on this branch of the case.

The defendant in error, in the brief, also introduces his remarks upon this subject by referring to the language of the trial judge concerning the laches of the plaintiff in error.

It is important, accordingly, to inquire what the trial court had to say on the subject of laches.

The trial court understood our contention thoroughly. He understood that we were contending that the plaintiff in error's mining claim was excepted out of the patent to the probate judge, was not conveyed by it at all—was excluded from it.

He admitted that if this view was correct no statute of limitations would be operative against us. This is his language:

"In this action the defendant Moran contends that the mining claim, located prior to and in his possession at the date of the application for the Helena town site, was absolutely excluded from and that the title thereto did not pass under the United States patent to the probate judge for said town site. If this premise is conceded, it necessarily follows that the plaintiff has gained no right by adverse possession to the lot of land in controversy, because the legal title to the same is still vested in the United States."

He denied our contention, however, and maintained that the patent to the probate judge in fact and in law conveyed to him every foot of ground within its boundaries, whether the same had been at the time of the entry covered by valid mining claims or not.

He then maintained, as a necessary deduction from that

conclusion, that the only remedy the plaintiff in error ever had since the issuance of the patent—by which the legal title, he maintained, to everything had passed from the Government of the United States—was either by a bill in equity to have the probate judge decreed a trustee in his interest for so much of the grant as was embraced in the plaintiff in error's mining claim, or to procure the United States to institute an action in equity to annul the patent as to such part of the grant, and the court held that he could pursue neither of these remedies because his laches barred him from both.

Transcript, 32, 33.

The course of reasoning is absolutely logical and the conclusion indisputable. If you grant that the title passed from the United States to the probate judge, then the statute of limitations and the law of laches may begin to operate; not before. But that is the question. Did the title pass or was this ground excepted out of the grant so that in the language of the law "no title" could be acquired to it?

Reference is made to the concession made by Judge Buck to the effect that if the mining claim of plaintiff in error was absolutely excluded from the grant to the probate judge the defendant in error could acquire no rights in the premises nor the plaintiff in error lose any by adverse possession. The same frank admission was made by Judge Knowles in the Butte town-site cases. Indeed, he argued unanswerably that if the theory of an absolute exclusion was maintained no occupancy, however long maintained, would give the occupant any rights nor deprive the mineral claimant of any.

5 Mont., 391, 392.

It needs no argument to demonstrate that if the laws of the United States prevent the application to the case of the State statute of limitations and adverse possession, they equally forbid the application of the law of laches.

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The legal principle that the statute of limitations will not begin to run while the legal title is in the United States is a deduction from the maxim that laches is not to be imputed to the Crown. So often has this been declared by this court that no specific reference is necessary.

Courts of equity apply statutes of limitations as well as courts of law; but often when the full period of the statute of limitations has not yet run, courts of equity apply the doctrine of laches. It is a plea of the same kind, only weaker.

It follows that if to apply the statute of limitations to a given case would be an interference with the right of the Government to the primary disposal of the soil, it would be equally such an interference to apply the doctrine of laches.

The plaintiff in error claims the right under section 2324, Revised Statutes of the United States, and other sections of the chapter in which it is found, to go into the possession of the premises in controversy and to obtain a patent for them. The judgment has denied him this right.

In the celebrated case of Gibson *vs.* Choteau, 13 Wall., 92, jurisdiction was taken by this court because the State court had applied the statute of limitation while the legal title was in the United States, and concerning the right of primary disposal it was in that case said:

"That power cannot be defeated nor obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted."

In Oaksmith *vs.* Johnston, 92 U. S., 343, is found the following pertinent language:

"The legal title being in the United States, the statute of limitations raises no bar to the action. Mere possession of the land, though open, exclusive, and uninterrupted for twenty years, creates no impediment to a recovery by the

Government, and, of course, none to a recovery by one who within that period receives its conveyance.

"In Burgess *vs.* Gray, 16 How., 18, the plaintiff and those through whom he claimed had been in possession of the land for which the action was brought for more than half a century, and among other grounds he relied upon this long-continued possession to recover against defendants, who entered under title derived from the United States. But the court said: 'The mere possession of public land without title will not enable the party to maintain a suit against any one who enters on it; and more especially he cannot maintain it against persons holding possession under title derived from the proper officers of the Government. He must first show a right in himself before he can call into question the validity of theirs.'"

It has been repeatedly determined that where title is claimed under an act of Congress, and the highest court of a State rules against the title so asserted, the decision may be reviewed by this court.

Pollard *vs.* Kibbe, 14 Pet., 353.
Lytle *vs.* Arkansas, 22 How., 193.
Berthold *vs.* McDonald, 22 How., 334.
Silver *vs.* Ladd, 6 Wall., 440.

II.

Law of the case.—The brief of defendant in error is in great confusion upon this point. The original answer of the plaintiff in error did not even mention his mining claim. It claimed *under* the probate judge, not *in hostility* to him. It averred that the legal title had passed to the probate judge, who, it was maintained, held it in trust for him, as to lot 31, on which plaintiff in error had a dwelling at the time of the entry of the town site.

His answer, in addition, was, in substance, that no legal plat of the Helena town site was in existence until 1885, when the McIntire plat was filed, and that though lots similarly

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designated appeared on the Wheaton plat, filed about the time of the entry, they pointed out other places on the earth's surface. Certain denials and allegations were made concerning the defendant in error's claim of adverse possession. These the lower court held admitted the adverse possession, and the supreme court held did not. On appeal from a judgment rendered on the pleadings, the supreme court held that an issue had been raised as to the adverse possession, and that a trial must be had.

The defendant in error then amended his complaint, and the plaintiff in error filed an answer to the amended complaint, with allegations as set out in the original brief herein.

Counsel for defendant in error has fallen into a number of errors in regard to these pleadings. The supreme court did not hold on the first appeal that the statute of limitations was not well pleaded. It was held that the answer raised an issue as to that, and that a judgment on the pleadings should not have been granted.

There was no question on the first appeal as to "whether the adverse possession of respondent was valid as against appellant's claim to the same as mineral lands," as stated at page 9 of the brief. There was no mention in the answer which first went to the supreme court that the plaintiff in error ever had a mining claim.

The plaintiff in error did not amend his original answer by setting up "that defendant in error and others entered and held said premises under deeds from said probate judge, subject to the *bona fide* rights of miners," as stated at page 11 of the brief.

After the motion for judgment on the pleadings as they now stand was heard, plaintiff in error asked to make a further amendment, setting up the fact as stated, but the court refused to permit it.

Transcript, pages 17 and 18.

And this allegation is not found in the answer.

The difference between the answer on which the case first went to the supreme court and the one before the court on the second hearing is pointed out by Judge Buck in his opinion in the—

Transcript, page 20.

The court did not hold anything about the efficacy of the adverse occupancy of the plaintiff on the first appeal; but, if it did, it is quite immaterial. It seems to have been contended, or might have been contended, on the first appeal that as to lot 31, which came into existence as a separate lot by the McIntire plat in 1885, and possibly as to the others, on some ground on other, that the title remained in the probate judge, and that the statute of limitations did not run against him, as he was an agent of the Government. If the court did hold against this contention, it was probably right; at least, so we understand—

Ames *vs.* City of San Diego, 101 Cal., 390.

But to hold that the statute is applicable *after* the title has passed to the probate judge is not to hold that it is applicable *before* it passes or *if it has not passed.*

The amended answer raised an entirely new issue, and "the law of the case" is inapplicable.

Castagnino *vs.* Battela, 82 Cal., 250.

But if the questions were identical it would make no difference. The supreme court of Montana might not be able to again consider the question as debatable, but no such inability can possibly extend to this court; otherwise it never could review a Federal question which a State court ruled upon in reversing a case and remanding it for a new trial. It is urged that a State statute is contrary to the Constitution of the United States. The trial court

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sustains this position, and the supreme court of a State takes a contrary view, reverses the cause, and sends it back for a new trial. It comes up again, and the State court applies the rule of the law of the case and affirms the judgment, the trial court having obeyed the mandate. It is idle to urge that the "law of the case" prevents this court from considering the question, or that it is such a separate question as interferes with this court's jurisdiction.

A case exactly in point is Seidenbach *vs.* Riley, 111 N. Y., 560.

And the rule, from the necessities of the case, has no application to intermediate courts, which the supreme court of a State is, in a cause which may come to this court.

United States *vs.* Elliot, 12 Utah, 119–124.

III.

The issuance of the patent is an adjudication of the fact that the land was non-mineral and the claim of election and estoppel.

It will occur to the court as striking, to say the least, that on these two propositions, touching the merits of the controversy, and indeed throughout the brief, it is never even intimated that the direct question was before any court. The Pawnbroker and Smokehouse cases are nowhere mentioned. Chambers *vs.* Jones is not heard of and Deffeback *vs.* Hawke is altogether forgotten. We say here and we said in the supreme court of the State and in the district court, as will be noticed by Judge Buck's opinion, that these cases, save Chambers *vs.* Jones, not then decided, were directly in point and determined this case. It is not now and never has been asserted that they do not nor that the judgment can stand save that they fall; but the counsel spreads out at length in his brief identically the same argument that was made in the Butte town-site cases

for the town-site claimants by Judge Knowles except as to one matter. Judge Knowles recognized the important consequences flowing from the conclusion that the mining claim was excluded from the patent. He argued ably against that contention, and then proceeded to deduce that the remedy was in equity to declare a trust or annul the patent. His argument will be found in connection with the report of the case of Silver Bow M. & M. Co. *vs.* Clarke, 5 Mont., 378.

The counsel for plaintiff in error in this case jumps the first proposition. He assumes that the patent to the probate judge takes in everything, mining claims and all. He does not argue it; he says it does.

That is the question in the case. If that question is decided against us, we must admit about all the rest of his argument.

So it is with the argument on election and estoppel. Identically the same claim was made in the Smokehouse cases, as shown in our original brief, at pages 33 and 34.

Identically the same argument was made by Judge Knowles. He likewise cited a large number of cases on the law of election.

See 6 Mont., 86, 87.

But the conclusion does not rest on those cases alone. After the State was admitted the supreme court of Montana denied the efficacy of the same contention in—

Mayer *vs.* Carothers, 14 Mont., 274.

So as to the argument of the counsel founded on the case of Barden *vs.* N. P. R. R. Co., Although that case had not been decided, its reasoning was anticipated by Judge Knowles, as will be seen in—

5 Mont., 394, 395.

We have refrained from discussing the reasons for the conclusion that the town-site patent did not pass the title to the ground covered by the plaintiff in error's mining claim. It has been decided by the supreme court of Montana and by this court that it did not, and no one has yet advanced any reason that was not fully considered in the cases so decided.

But as much claim is made for Barden *vs.* N. P. R. R. Co. in its relation to Deffeback *vs.* Hawke, a word or two may be appropriately added.

By the act under consideration in the Barden case there was granted to the railroad company *each alternate section not mineral.* The grant was a float fixed by the filing of the map of definite location. The title passed to all lands not mineral; but it became necessary to determine which were mineral and which were not mineral. The court held that before issuing the patent the department was called upon to determine which were mineral and to issue patents for those and to say which were not mineral and to refuse to issue patents for those.

No such condition exists with reference to the issuance of a patent to a probate judge. As pointed out in one of the opinions, a rich mineral deposit is discovered, and immediately a town grows up around and above it. The probate judge applies for a patent to the whole region.

There is not a trace in the land office of any claim to it by any one. The notices of location are in the local county recorder's office, not in the land office. He is permitted to enter and patent goes, and the very law which gives him the patent says that no title shall be acquired by it to any valid mining claim or mining possession. How can such a proceeding be said to be an adjudication shutting out the rights of those holding mining claims within the limits of the patent, the law making no sort of provision even for notice to them?

There is no sort of conflict and can be no conflict be-

tween Deffeback *vs.* Hawke and Barden *vs.* N. P. R. R. Co. in view of the considerations adverted to and the essential difference in the statutes and the conditions attendant upon the issuance of patents under them.

It may be noted that the counsel never fails to say that the patent adjudicated that the land in question was non-mineral, as if that was our sole contention, while we stand not only upon the claim that the ground was mineral—a mine—but also that it was a valid mining claim and possession, and it is necessary to go further in order to defeat our rights, and hold that the patent adjudicated that we had no valid mining claim or possession at the time of the entry within its limits.

It may be considered of importance that the Land Department originally held that the patent to the probate judge conveyed everything within its bounds, and that by its issuance the department lost jurisdiction; that if any person claimed he had a mining claim within its bounds he might apply to the department to request the law department to institute suit to cancel the patent as to the interference.

But, controlled by the cases adverted to, it now recognizes that the patent, in the language of Deffeback *vs.* Hawke, "is inoperative" as to any mining claim existing at the time of the entry, and the application for patent to such claim is entertained without further formality, leaving the town-site claimants the right to try in the local courts the validity of the claim of the mineral claimant.

Pacific Slope Lode *vs.* Butte Town Site, 25 L. D., 518.

Some claim is made that the answer is defective as a pleading in not averring that the ground claimed by plaintiff in error contained such "an amount of minerals as to

be valuable for mining purposes." It will be observed that the answer follows the exact language of section 2392, R. S. U. S.

The counsel again loses sight of the fact that the statute does not say that no title shall be acquired under the town-site act to mineral lands, or that mineral lands shall not be subject to disposition under the chapter, but that no title shall be acquired to any "mine" or "mining claim or possession."

If the discovery and location were made after the entry of the town site the question urged would arise, not as one of pleading, but of proof. On this record it is not presented at all.

The brief offers no reason why the parties should not proceed to try the existence of the plaintiff in error's mining claim at the time of the town-site entry.

Respectfully submitted.

THOMAS J. WALSH,
Counsel for Plaintiff in Error.